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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HAROLD L. MYRON,
Petitioner,

v.

TRUST COMPANY BANK LONG-TERM DISABILITY BENEFIT PLAN, TRUST COMPANY BANK and GREAT-WEST LIFE ASSURANCE COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH [redacted] CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does a state evidentiary rule supercede the Employee Retirement Income Security Act of 1972 (29 U.S.C. §1001, et seq.) so that parol evidence may be used to establish offsets to an employee benefit plan even though the Act expressly requires that the governing plan document specify the basis on which payments are made to and from the plan?

PARTIES TO THIS PROCEEDING

The party-plaintiff to this proceeding is Harold L. Myron.

The party-defendants to this proceeding are Trust Company Bank Long-Term Disability Benefit Plan, Trust Company Bank and Great West Life Assurance Company.

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IN THE

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TRUST COMPANY BANK LONG TERM DISABILITY BENEFIT PLAN, TRUST COMPANY BANK and GREAT WEST LIFE ASSURANCE COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Harold L. Myron requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on October 20, 1982, and issued as mandate on January 13, 1983.

OPINION BELOW

The judgment of the Court of Appeals (A-37) was issued without opinion and was marked "Do Not Publish." The opinion of the District Court (A-2) is officially reported as Myron v. Trust Company Bank Long Term Disability Benefit Plan, 522 F.Supp. 511 (N.D. Ga. 1981).

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was dated and entered October 20, 1982 (A-37). The order denying the petition for rehearing filed on behalf of the petitioner was entered on December 1, 1982 (A-38). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case was brought under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 et seq. (A-42). This case principally involves

the following sections of that act: §104(b)(4) (29 U.S.C. §1024(b)(4)) (A-42); §402 (29 U.S.C. §1102) (A-51); §404 (29 U.S.C. §1104) (A-53); §502(c) (29 U.S.C. §1132(c)) (A-56); and §514(a) (29 U.S.C. §1144) (A-58) and United States Const., Art. VI, §2 (the "supremacy clause").

STATEMENT OF THE CASE

I. Proceedings in the courts below

The petitioner, Harold L. Myron, filed this action in August, 1980. Named as defendants were Trust Company Bank Long-Term Disability Plan ("the disability plan"), Trust Company Bank ("Trust Company"), and Great-West Life Assurance Company ("Great West"). The jurisdiction of the District Court was invoked under 29 U.S.C. §1132. The petitioner claimed in the complaint, as amended, that he was entitled to receive monthly benefits of $1,770 per month under the disability plan. The defendants claimed in their answers that the plaintiff was eligible for disability benefits of only $50.00 per month.

Following discovery, cross-motions for summary judgment were filed. The District Court denied the petitioner's motion and granted the defendants' motion, entering final judgment for the defendants. The Eleventh Circuit affirmed the judgment of the District Court without opinion and denied the petitioner's motion for rehearing.

II. Facts.

The petitioner retired from the United States Army in 1973, after 30 years of service. Shortly after his retirement, he became an employee of Trust Company and began receiving military retirement pay.[1/]

Trust Company sponsored a disability plan for its employees. Until April 30,

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[1/] The District Court's order indicates that petitioner began receiving military retirement pay as of "August 1, 1979." Myron v. Trust Company Bank Long Term Disability Benefit Plan, 522 F.Supp. 511, 513 (N.D.Ga. 1981). (A-4). That is probably a typographical error, as the benefit commencement date was August 1, 1973.

1979, the plan was insured and administered by Northwestern National Life Insurance Company ("Northwestern"). The petitioner was furnished with a written description of that plan. On May 1, 1979, Trust Company adopted a new disability plan with Great West. Under the new plan, eligibility requirements were liberalized, maximum benefits were increased, and the method of funding was changed from a fully insured plan to a self-funded plan which had only residual insurance.

In early 1978, the petitioner began receiving some of his military retirement in the form of income-tax free disability benefits. In May, 1979, the petitioner notified Trust Company that he would be taking disability retirement. In July, 1979, he was advised by Trust Company that his military retirement would be offset against the benefits provided by its disability plan. He was furnished a copy of the provi-

sions of the Northwestern plan which provided for offsets. He was not advised of the expiration of the Northwestern plan and the commencement of the new Great West plan or of the changes effected thereby. Because he was not advised of these changes, he did not question the offsets.

On July 31, 1979, the petitioner retired due to a total and permanent disability. As of January, 1980, he was awarded basic social security retirement benefits of $485.50 per month. In February, 1980, after he submitted a disability claim, a $1,770 benefit was approved by Great West subject to an offset for his social security benefits.

In March, 1980, after he was sent two benefit checks, that approval was rescinded. At that time, the defendants advised the petitioner that both his social security benefits and military retirement benefits should have been offset against his basic

benefit, thereby reducing the benefit to the plan minimum of $50 per month.

In order to determine the basis of the defendants' contentions, in April, 1980, the petitioner, through his attorney, requested a copy of the governing plan documents. In response, the defendants sent him a copy of the Northwestern disability plan. That expired plan contained the offset provisions relied upon by the defendants. Upon further inquiry, he was furnished copies of an initial draft of the Great West plan. The draft had been prepared in December, 1979, more than four months after his disability retirement. The offsets contained in that draft were different than the offsets contained in the Northwestern plan. Those offsets clearly did not include his military retirement. The defendants contended, however, that this draft had not been approved.

Unknown to the petitioner at the time, the only written document memorializing the Great West disability plan which existed on the date of his retirement provided for no offsets. It was an application for insurance which had been accepted and administered by Great West as though a formal plan had been issued. As the District Court acknowledged:

> The application, Gill Deposition, Exhibit 19, does contain the four required features of an ERISA 'plan' as set out in [29 U.S.C.] Section 1102(b). There is no mention of any offset provisions in the application."

Myron, 522 F.Supp. at 517 (A-18). The petitioner was not furnished a copy of the application until after this action was commenced in August, 1980.[2/]

[2/] The District Court's order states that "defendants provided plaintiff with copies of both the Northwestern plan and the application which together contained all of the aspects of the plan relevant to this action." Myron, 522 F.Supp. at 519. (A-30). This statement implies that the petitioner was furnished the application pursuant to his request in April, 1980,

According to the Great West employee who approved the petitioner's disability claim, the approval was based upon the application. According to that employee's supervisor, the approval was based upon the initial Great West draft.[3/] In any event, all acknowledge that the application was the only document which had been accepted by the parties at the time of the petitioner's disability retirement and at the time of his benefit commencement. No formal Great West plan was approved until after this litigation began. Apparently, that final plan document incorporated the same offset provisions as were contained in the Northwestern plan.

2/ (Cont'd.) but it was not furnished then. The petitioner is not aware of any conflicting evidence or contentions concerning this point.

3/ The latter explanation is more likely, as the approval was subject to an offset for social security benefits and the draft, but not the application, provided for such an offset.

The petitioner contends that the application controls and that he is entitled to receive disability benefits of $1,770 per month unreduced by offsets. The defendants contend, and the lower courts concluded, that the petitioner's benefits should be reduced by the offsets contained in the expired Northwestern plan. This result is based entirely on parol evidence provided by the defendants' employees and agents stating that Great West and Trust Company intended that the offsets contained in the Northwestern plan would be carried forward into the new Great West plan. It is manifest that this intention was not evidenced by the application (or the initial Great West draft). As the District Court observed:

> If only the provisions of the application for insurance were relevant here, the Court would be inclined to rule for plaintiff. However, because of the admissible parol evidence existent here, the Court cannot do so.

Myron, 522 F.Supp. at 517.

REASONS FOR GRANTING THE WRIT

The Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court.

This case arose under ERISA, a remedial statute which subjects employee benefits plans to a comprehensive regulatory scheme. ERISA was enacted for the stated purpose of curbing abusive practices in the establishment, maintenance and administration of such plans. 29 U.S.C. §1001 (A-42). ERISA expressly preempted conflicting state law. 29 U.S.C. §1144 (A-58).

In this case the District Court found that Trust Company's written application to Great West for insurance set out the elements essential under ERISA for a disability plan (29 U.S.C. §1102(b)). That application did not contain any provision for offsets against plan benefits. Yet, that Court found that the application for insurance was

not an integration of the disability plan and permitted the defendants to use parol evidence to incorporate into the Great West plan offset provisions contained in the expired Northwestern plan.[4/] In doing so,

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[4/] An analogous situation existed in Snyder v. Titus, 513 F.Supp. 926 (E.D.Va. 1981). There, a pension claimant was denied benefits when the trustees referred to the provisions of a prior plan to determine whether to disregard service credits earned during the period the prior plan was in effect. This was done even though the current plan made no reference to the prior plan in connection with the termination of service credits. In concluding that the denial of the claimant's benefits was wrongful, the court reasoned: "If the Trustees' interpretation of the plan were correct -- that alleged omissions in current versions of the Pension Fund are to be filled by reference to relevant prior versions of the plan -- participants and Trustees alike would be required to read and understand the current as well as all prior versions of the plan in the event an interested party claims a 'gap' exists in the effective version... the Trustees have read an ambiguity into the pension plan that is not apparent on the face of the plan, and for which no justification has been given. The Court cannot permit such an unfounded interpretation to deprive an employee of his benefits where he has no way of anticipating such a deprivation upon reading the clear language in the plan in effect at the time of his application. A contrary result, the Court believes, would open the door to a shell game in the administration of pension plans, frought [sic] with potential abuse and caprice." 513 F. Supp. at 933-35.

the Court used state law regarding parol evidence to contradict the clear Congressional mandate as to the form that an employee welfare plan must assume.

The Congressional command is this:

> (a)(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument....
>
> (b) Every employee benefit plan shall -
>
> (1) Provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this title,
>
> (2) describe a procedure under the plan for the allocation of responsibilities for the operation and administration of the plan...,
>
> (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and
>
> (4) specify the basis on which payments are made to and from the plan.

29 U.S.C. §1102 (emphasis supplied). (A-46).

The requirement that an employee benefit plan be written and contain four key elements is coupled with the mandate that:

> (a)(1)...a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--...
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.[5/]

29 U.S.C. §1104. (A-53).

[5/] The Joint Conference Report on ERISA noted that "[U]nder the Conference substitute, plan fiduciaries also must act in accordance with plan documents and instruments to the extent that they are consistent with the requirements established in the bill." 1974 U.S. CODE CONG. & AD. News, 5083. A similar comment was contained in the report accompanying the Senate Bill. Id., at 4988. The reports of the House Education and Labor Committee and the Senate Labor and Public Welfare Committee, which accompanied the Bills in the House and Senate, respectively, stated: "The principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans. These salient principles place a two-fold duty on every fiduciary; to act in his relationship to the plan's fund as a prudent man in a similar situation and under like conditions would act, and to act consistently with the principles of administering the trust for the exclusive purposes previously enumerated, and in accordance with the documents and instruments governing the fund unless they are inconsistent with the fiduciary principles of the section." Id. at 4651 and 4866. (Emphasis added.)

The requirement that the plan be established and maintained in writing is a safeguard to ensure that "every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." Conference Committee Report, 1974 U.S. CODE CONG. & AD. News at 5077-5078. It is manifest that parol affidavits and depositions are not "plan documents" from which Congress intended that covered employees discern their rights and duties.[6/] The use of parol evidence to

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[6/] Congress was particularly concerned about the effectiveness of communication of plan contents to participants. The reports accompanying both the Senate and House Bills noted that: "Subcommittee findings were abundant in establishing that an average plan participant, even where he has been furnished an explanation of his plan provisions, often cannot comprehend them because of the technicalities and complexities of the language used." 1974 U.S. Code CONG. & AD. News, pp. 4646 and 4847. The worst fears of Congress are realized by this case, as no participant could have even determined what constituted the plan.

establish offsets to the schedule of benefits set forth in the Great West application is in direct conflict with the directive that the plan document "specify the basis on which payments are made to and from the plan" and that the plan be administered in accordance with its governing documents.

Assuming that the lower courts' interpretation of the state law of parol evidence is correct, that law must yield in a direct conflict with a supreme federal directive.[7/] U.S. Const. art. VI, §2; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). Congress intended that the ERISA scheme regulating plan establishment, reporting and disclosure

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[7/] This case presents the unique issue of which law prevails in a conflict between a state rule of evidence and a rule of substantive federal law. The lower courts' decisions in this case create the issue even though the application of the parol evidence rule is tenuous in light of the Georgia rule that documents comprising a contract required to be in writing must be "internally connected [and] intelligible without parol aid." Freeman v. Baker, 147 Ga. App. 168, 248 S.E. 2d 298 (1978); Industrial Welding & Tool Supplies, Inc. v. CIT Corp., 157 Ga. App. 611, 278 S.E.2d 50 (1981), see discussion, infra, at 19-20.

would apply uniformly in all jurisdictions, unaffected by local law. That intention was stated as follows:

> (a) Except as provided in subsection (b) of this section [dealing with pre-ERISA regulation of insurance, banking, and securities] the provisions of this title [29 U.S.C. §§1001-1144] and title IV shall supercede any and all state laws insofar as they may now or hereafter relate to any [covered] employee benefit plan....[8/]

29 U.S.C. §1144(a) (1976). (A-58).

In this case, the law of parol evidence and its exceptions are not specifically targeted at benefit plans; yet as applied, it unavoidably "related to" those plans, and its use was impermissible. Where the mandate of Congress is explicit it is controlling. Brotherhood of Locomotive Engineers v.

[8/] A Congressional intention to preempt state laws concerning the reporting and disclosure aspects of employee benefit plans was found under ERISA's predecessor, the Welfare and Pensions Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (1958). See People v. Automobile Transporters Welfare Fund, 17 A.D.2d 448, 235 N.Y.S.2d 702 (1962); aff'd 13 N.Y.2d 814, 192 N.E.2d 222; cert denied 376 U.S. 908 (1963).

Chicago Rock Island and Pacific Railroad Company, 382 U.S. 423, 444 (1966).[9]

The purported intention of Great West and Trust Company to incorporate the offsets of the previous policy into the Great West plan is entirely irrelevant. The petitioner respectfully suggests that fiduciaries (like the defendants) really are obligated by ERISA to maintain the plan in writing so that employees can examine the plan documents and determine what their rights are. The petitioner further suggests that plan fiduciaries really are required by ERISA to administer the plan in accordance with the governing documents. Permitting plan fiduciaries to establish offsets by evidence not contained in the plan instruments is incon-

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[9] Without this explicit directive, the intent of Congress to preempt state law may be implied from the structure and purpose of the statutory framework. Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977).

sistent with the Congressional requirement that plan instruments, and not post hoc declarations, govern. This inconsistency is fatal to the establishment of parol offsets. See, e.g., Nash v. Florida Industrial Commission, 389 U.S. 235 (1967); Hill v. Flordia ex rel. Watson, 325 U.S. 338 (1945); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942).

The state in this case has no counterbalancing interest to be protected by upholding the application of its law. Cf. Cambell v. Hussey, 368 U.S. 297 (1961); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960). In fact, Georgia law does not generally allow the use of parol evidence to aid in the establishment of a contract governed by the statute of frauds:

> In Capital City Brick Co. v. Atlanta Ice &c. Co., supra, p. 443, it is pointed out 'Any signed writing or series of writings internally connected, intelligible without parol aid, and showing or admitting an agreement coextensive with the stipulations of the alleged contract, is

> sufficient.' (Emphasis supplied.) In North & Co. v. Mendel & Brother, 73 Ga. 400, the Supreme Court held that several papers might form such a memorandum as would satisfy the Statute of Frauds provided the contents of the signed paper make reference to the other written paper as to enable the Court to construe the whole of them together. 'If, however, it be necessary to adduce parol evidence, in order to connect a signed paper with others unsigned, by reason of the absence of any internal evidence in the signed paper to show a reference to or connection with the unsigned papers, then the several papers taken together do not constitute a memorandum in writing of the bargain.' Accord, Lester v. Heidt, 86 Ga. 226, 228 (12 S.E. 214). Thus, two writings, one signed and the other unsigned, cannot be correlated by parol evidence. (Emphasis in original).

Freeman v. Baker, 147 Ga. App. 168, 248 S.E. 2d 298 (1978). The reason for this rule is simple. The use of parol evidence to establish any of the provisions of a contract contradicts the requirement that it be in writing.

Defendants Trust Company and Great West are fiduciaries with respect to the disability plan. They had many fiduciary responsibilities under ERISA. This case presents a situation in which the fiduciary requirements were largely ignored:

(1) As fiduciaries, they were bound to maintain the plan in writing and administer it according to its terms solely for the benefit of participants and their beneficiaries. 29 U.S.C. §§1102(a)(1) and 1104((A)(1) (A-51, A-53). Yet, for over 15 months after the Great West plan became effective, it was evidenced in writing only by an application. Further, in order to reduce the plaintiff's benefits from the $1,770 per month provided by the application to only $50 per month and thereby reduce the cost of the plan to them, they have sought to supplement the application by parol evidence.

(2) They were required to furnish a summary of the "material modifications in the terms of the plan" relating to eligibility, maximum benefits and funding within 90 days after the Great West plan was substituted for the Northwestern plan. 29 U.S.C. §§1022, and 1024(b) (A-49). Yet, the

petitioner was not advised that the plan had been changed and was never furnished a summary of any of the "material modifications."

(3) They were required to furnish a copy of the governing documents of the plan within 30 days after the petitioner made a written request. Yet, the petitioner was first furnished a copy of the expired Northwestern plan in response to his request. Upon further inquiry, he was furnished a copy of the initial draft of the Great West plan and advised that the draft had not been approved. The petitioner was not furnished a copy of the application until after this litigation began, more than 120 days after the petitioner's request.

The decision of the District Court, affirmed without opinion, represents a significant erosion of the safeguards Congress wanted. That decision allowed a reduction of the petitioner's benefits based solely

on parol offsets. The application of parol evidence in this case is not based upon a local anomaly in the parol evidence rule. Its application in this case portends its application in all 50 states. The fact is, the permissible use of parol evidence in cases involving a contract required to be in writing is much more limited in Georgia than in most states. Cf. Freeman v. Baker, 147 Ga. App. 168, 248 S.E.2d. 298 (1978); 4 Williston on Contracts, §583 (3rd ed. 1961); Annot. 81 ALR2d 991, 999-1003, §4(a), 5; Corbin on Contracts, §§508-519 (1 Vol.ed. 1952).

The result reached by the District Court was not justified by any special circumstance. The defendants did not show that they failed to incorporate the offsets into the plan because of providential cause, a wrongful act of the plaintiff, or some other legally cognizable excuse. They offered no explanation as to why the offsets

were not included in the application or why a complete, formal plan including the offsets was not prepared in timely fashion. They made no showing, and none was required, of a good-faith effort to comply with their duties under ERISA. They simply testified that they intended to carry the old offsets forward into the new plan. Apparently, they were either ignorant of the requirements of ERISA, they forgot those requirements, or they ignored them.

While there might, in some exceptional circumstances, be a justification for creating a judicial exception to the ERISA requirements that plans be maintained in writing and administered in accordance with the writing, this case presents no such circumstance. ERISA is an extremely comprehensive and carefully drawn piece of legislation. It represents the response of Congress to significant abuses which have

occurred in the private employee benefit system.[10/]

In light of the present weakness of the social security system and the consequent increasing importance of private pensions, it is imperative that the mandate of ERISA be unerringly carried out. The message of ERISA is clear. It imposes special duties and responsibilities upon plan fiduciaries and it imposes civil and criminal liability for breaches of those responsibilities. See 29 U.S.C. §§1109 and 1131 (A-55, A-56).[11/] Fiduciaries who, through ignorance

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[10/] After conducting twelve years of investigation into abuses that stripped employees of benefits under private pension plans, Congress enacted ERISA to replace the Welfare and Pensions Plans Disclosure Act (Pub.L.No. 85-836, 72 Stat. 997 (1958). It had proved ineffective because of weak disclosure requirements and a still weaker enforcement mechanism. [1974] U.S. CODE CONG. & AD. News 4838, 4841.

[11/] 29 U.S.C. §1109 provides in part that: "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from

or disregard, violate the mandates of ERISA, do so at their own peril.

It is true, that before the petitioner retired, he had no reason to expect disability benefits which were not subject to the offset provisions of the Northwestern plan. This is so because he was not furnished the governing document of the Great West plan or advised of the adoption of that plan before his retirement. Had he been furnished a copy of the only existing plan document,

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11/(Cont'd.) each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary...." (A-55). 20 U.S.C. §1131 provides in part that: "Any person who willfully violates any provision of part 1 of this subtitle [29 U.S.C. §§1021-1031], or any regulation or order issued under any such provision,; shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both...." (A-56).

he would have rightly expected a benefit of $1,770 per month. The defendants' failure to inform the petitioner of the material changes in the plan was an ERISA violation. Because of this violation, the petitioner will never know, to a certainty, that he was not selected for a discriminatory application of benefit offsets.[12/] Because of this violation, the petitioner will never know, to a certainty, that the failure to advise him of the changes was not a deliberate act of deceit. This lawsuit resulted from the defendants' violation of ERISA and the suspicion the violation justifiably generated. ERISA was designed to prevent exactly what has occurred here, distrust and suspicion, uncertainty as to benefits and self-serving declarations by plan fiduciaries.

[12/] Plans like a disability plan in which the occurrence of claims is actuarially infrequent are highly susceptible to discriminatory administration. Under such plans, vague or imcomplete descriptions of benefits can be used to control benefit payments, depending upon who makes a claim, because the determination of a right to benefits in one case is not likely to affect other claimants.

If the ruling of the lower courts is not corrected, what would prevent the defendants in this case from doing the same thing again - adopting a new plan, evidencing it by a sketchy application and remaining "flexible"? What would prevent other fiduciaries from claiming the benefit of self-serving parol evidence to reduce the benefits of claimants who were in particular disfavor with the plan sponsor? The answer is, the District Court's opinion makes such occurrences likely.

The opinion presents no guidelines or limitations on the use of parol evidence to supplement plan documents. Yet, the use of parol evidence in the case of benefit plans is unusually risky because there is little likelihood that any participant will be in a position to offer evidence contrary to the claimed intention of the plan fiduciaries. Just as occurred in this case, most courts addressing such an issue will be forced to

proceed without the safeguard of conflicting interests among the parties with knowledge. This a world in which self-interest leads to discrimination and untruthfulness too frequently. For this reason, the court must not allow ERISA's preemptory regulatory scheme to be subverted by the application of a state parol evidence rule.

CONCLUSION

Because the Georgia law of parol evidence, as applied in this case, directly clashes with supreme federal law, and because Congress intended that ERISA alone govern the establishment, maintenance and disclosures of the plan at issue, the District Court erred in permitting the petitioner's benefits to be reduced by parol offsets. For these reasons, this petition for a writ of certiorari should be granted.

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APPENDIX

The judgment of the Eleventh Circuit Court of Appeals was issued without opinion under Circuit Rule 25. That rule provides as follows:

> RULE 25. AFFIRMANCE WITHOUT OPINION
>
> When the Court determines that any of the following circumstances exist:
>
> (a) judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> (b) The evidence in support of a jury verdict is not insufficient;
>
> (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
>
> (d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
>
> and the court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

A copy of that judgment may be found at page A-37.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HAROLD L. MYRON,	:	
	:	
Plaintiff,	:	CIVIL ACTION NO.
	:	C80-1428A
vs.	:	
	:	
TRUST COMPANY BANK LONG TERM DISABILITY BENEFIT PLAN, TRUST COMPANY BANK, and GREAT WEST LIFE ASSURANCE COMPANY,	:	
	:	
Defendants.	:	

ORDER

This action under The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001, et seq., and the Court's pendent jurisdiction, is before the Court on plaintiff's motion to amend his complaint, defendants Trust Company Bank Long Term Disability Benefit Plan and Trust Company Bank's (hereinafter "the Bank") motion for summary judgment, defendant Great West Life Assurance Company's (hereinafter "Great West") motion for summary

judgment and plaintiff's cross-motion for summary judgment.

Motion to Amend

Defendants have filed no response to plaintiff's motion to amend the complaint. The Court therefore FINDS that this motion is unopposed and hereby GRANTS plaintiff's motion. Local Rule 91.2.

Motions for Summary Judgment

The basic undisputed "background" facts of this case (culled from the various statements of facts filed in support of the motions before the Court) are these:

The plaintiff, Harold L. Myron, is sixty years of age. Plaintiff served in the military for thirty years and retired from the United States Army as a full colonel in June 1973. From July 1973 through August 1, 1979 plaintiff was an employee of Trust Company Bank. Plaintiff retired from the bank due to total and

permanent disability effective August 1, 1979. At the time of his retirement, plaintiff's basic salary with the Bank was $35,400 per year.

As a result of his military service, plaintiff became eligible for and began receiving military retired pay as of August 1, 1979 [sic]. Effective April 1, 1978, plaintiff became eligible for and began to receive disability benefits from the Veterans Administration (VA). Effective September 1, 1979, plaintiff became eligible to receive 100 percent service-connected VA disability payments. Both of these payments have increased between the time of plaintiff's original eligibility and the filing of this suit.[1/]

[1/] The exact breakdown of the payments plaintiff is receiving is apparently in dispute. Plaintiff asserts that his military retirement pay is offset by his VA payments. Defendants contend (by implication) that the two payments are separate and that there is no such offset. At any rate, the totals reflected in plaintiff's answer to interrogatory number 2 are greater than the "maximum monthly indemnity" (see below) for which he is eligible.

In May 1980, plaintiff was awarded social security benefits in the amount of $485.50 per month. Those benefits were awarded retroactively to January 1, 1980.

Plaintiff, as of March 31, 1981, was receiving VA disability, social security disability, and military retirement pay totaling at least $3,875 per month or at least $46,500 per year. Plaintiff's Answers and Objections to Interrogatories Nos. 1, 2, 3; Appendix Tab B, Great West's Appendix to Statement of Undisputed Material Facts.

Sometime prior to 1976, Trust Company Bank initiated for its employees a long-term disability benefit plan. From July 15, 1975 through April 30, 1979, this plan was funded through an employee group long-term disability income insurance policy with Northwestern National Life Insurance Company (hereinafter "Northwestern").

In September of 1978, Great West submitted to Johnson & Higgins of Georgia, Inc. (an insurance consulting firm) a proposal containing its funding recommendation for a long-term disability insurance plan for Trust Company Bank. The basic provisions of this proposal were eventually accepted by Trust Company Bank as of May 1, 1979.

As of May 1, 1979, the Bank contracted with Great West to convert the funding of the plan to a self-funded program with claims adjudication and fund management services to be provided by Great West.

The Issues

There are two key questions to be decided here:

(1) What are the terms of the Trust Company Bank Long-Term Disability Benefit Plan which are applicable to plaintiff?

(2) Should plaintiff's military retirement pay, VA disability payments and social security disability payments be deducted from any payments to which he may be entitled under the Bank's benefit plan?

Under the terms of the Bank's benefit plan, the "maximum monthly indemnity" that the plaintiff is eligible to receive is $1,770 per month. This figure is equal to 60 percent of plaintiff's salary on the date of his disability, and is undisputed by the parties. What is disputed is how much of this $1,770 per month plaintiff is entitled to receive.

The center of the dispute is the following excerpt from the section of what, for now, will be called the original group disability insurance plan[2/] entitled "Income from Other Sources":

[2/] The original plan is that plan under which the Bank was operating prior

The total of an Insured's "income from other sources" is deducted from his Gross Monthly Indemnity to determine his Monthly Income Benefits and includes the following:

(a) Any benefits the Insured and his dependents are eligible to receive because of the Insured's disability or age under the Federal Social Security Act, Public Employees' Retirement Association, Railroad Retirement Act or any other Federal, State, County or Municipal Retirement Act or Law ...
....

(c) Any benefits the Insured is eligible to receive from a retirement plan, pension plan, or other similar plan for which the Insured's past or present employer has directly or indirectly sponsored, or for which such employer has paid any part of the cost or has made a payroll deduction.

(d) Any benefits the Insured is eligible to receive under Workmen's Compensation or similar legislation or under any governmental or private disability income plan which provides benefits for loss of time from

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2/ (Cont'd.) to the May 1, 1979 switchover from Northwestern to Great West. What actually constitutes "the Plan" is in dispute and the Court's characterization here is not a comment on the merits of that dispute, but rather is simply a convenient mode of reference.

> employment, for which the policy-holder or the Insured's past or present employer contributes or makes payroll deductions.

Allison Deposition, Exhibit 15.

Plaintiff, in his original complaint, asserted that he is entitled to receive $1,284.50 per month from the Bank under the benefit plan. This figure represents the $1,770 maximum monthly indemnity less the $485.50 per month plaintiff initially received in social security disability benefits. Complaint, ¶16. In his amended complaint, plaintiff asserts that he is entitled to the entire $1,770 in monthly benefits under the Plan. First Amendment to Complaint, ¶16.

It is plaintiff's contention that his military retirement pay, his VA disability benefits, and (now, apparently) his social security disability benefits, should not be offset against his benefits under the Bank's plan. Plaintiff offers three theories to support his position. The

first two are premised on the argument that "the plan" under which the Bank was administering its disability benefit program prior to May 1, 1979, and from which the above-quoted excerpt was taken, was terminated when the Bank switched insurance companies from Northwestern to Great West. Because the relevant ERISA section requires that every employee benefit plan be "maintained pursuant to a written instrument," 29 U.S.C. §1102(a)(1), and because, under plaintiff's argument, the original plan was no longer binding, another "written instrument" must have set out the terms of the plan.

Consequently, plaintiff's first theory is that the Bank's application for insurance to Great West and Great West's acceptance letter constitute an insurance policy between the Bank and Great West, despite the fact that these documents are incomplete and contradictory, because

"they more accurately reflect the status of the Bank's long-term disability plan as of May 1, 1979, than any other document which existed at that time." Plaintiff's Reply Brief at 9. As the application did not include any offsets for income from other sources or even refer to those offsets in the (as plaintiff characterizes it) "preexisting Northwestern National policy," plaintiff argues he is entitled to the full disability payment of $1,770 per month.

Secondly, plaintiff argues that if the Court does not accept the application as being the controlling plan document, an initial draft prepared by Great West in December 1979 which was sent to the Bank through Johnson & Higgins for approval and/or comment constitutes the controlling plan document. This draft contained offset provisions which, plaintiff argues, would only encompass his social security

payments, and, therefore, he would be entitled under this "plan" to the full monthly benefit less the amount of the social security payments.

Plaintiff's final theory is that even if the case is controlled by the "Northwestern National document," the relevant portions of which are set out above, the plaintiff is still entitled to disability benefits of $1,284.50 per month because his military retirement pay and VA benefits do not fit into the various categories of "income from other sources" listed in that document.

Plaintiff also seeks to recover damages under ERISA of $100 per day plus attorneys' fees due to the alleged failure of defendants to provide him with copies of the benefit plan in effect on the date of his disability. Finally, plaintiff seeks $100,000 in exemplary damages against defendants.

The position of all of defendants is simply that "the Plan" in effect prior to May 1, 1979 remained in effect with only two modifications which are irrelevant here[3/] after the Bank switched insurance companies from Northwestern to Great West. It is their contention that the Plan itself is a separate entity from the insurance policy, and that all of the parties involved in establishing the new setup agreed that the provisions of the plan entitled "Long Term Disability for Employees of Trust Company of Georgia, et al.," Allison Deposition, Exhibit 15, were to remain in effect after May 1, 1979. It is asserted by defendants that the change to Great West merely altered the funding arrangement of the plan and not the plan itself, and that Great West was simply to

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[3/] These modifications dealt with a liberalized eligibility provision and an increase in the maximum monthly benefit provided for by the plan.

supply their administrative expertise in implementing the Bank's benefit plan.

The defendants argue that plaintiff's military retirement pay and VA benefits do fall under the "Income from other sources" offset provisions of that Plan; that because of this, plaintiff's income from other sources exceeds his total "Gross Monthly Indemnity" of $1,770, and that, therefore, plaintiff is entitled only to the $50 per month minimum payment provided for in the Plan.

Finally, defendants argue that because plaintiff was provided with a copy of the Plan in Exhibit 15, no ERISA violation occurred. Great West argues further that it was not the ERISA Plan administrator under the provisions of 29 U.S.C. 1002(16) and that, therefore, it was under no obligation to supply plaintiff with a copy of the Plan as ERISA requires of the employer.

The Standard

Under the terms of Federal Rule of Civil Procedure 56(c), a motion for summary judgment may be granted only if there is no issue as to any material fact and the law favors the moving party. Marcus v. St. Paul Fire & Marine Insurance Co., 651 F.2d 379, 382 (5th Cir. 1981).

As defendant Trust Company points out, despite the many statements of facts and statements of disputed facts filed in support of an in opposition to the motions in this case, no real material facts are disputed. The dispute is in the legal interpretation of the effect of the facts, and in which facts are decisive of the issues. Consequently, the case is ripe for summary judgment disposition.

What is "The Plan"?

As noted above, all of the defendants contend that the document entitled "Long Term Disability for Employees of Trust

Company of Georgia, et al." which contains the offset provisions at issue constitutes "the Plan" by which the outcome must be governed. They attempt to draw a distinction between the terms "plan" and "policy," and argue that, although the policy was changed from one with Northwestern to one with Great West, the parties (i.e., the defendants) all agreed that the plan which was in effect prior to the change in insurance companies was to remain in effect.

This argument cannot stand in light of the applicable ERISA provision. Twenty-nine U.S.C. §1102 provides in relevant part:

> (b) Every employee benefit plan shall --
>
> (1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,
>
> (2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan...,

> (3) provide a procedure for amending such plan, and for identifying the persons who have authortiy to amend the plan, and
> (4) specify the basis on which payments are made to and from the plan.

As plaintiff correctly points out, the Northwestern "arrangement," of which the document defendants label "the Plan" was an integral part, expired by its own terms on April 30, 1979. Plaintiff's Brief at 3. That part of the Northwestern documents which contains the offset provisions cannot in and of itself be considered a "plan" under section 1102(b), because the first three elements listed in that section no longer existed when the arrangement between the Bank and Northwestern was terminated. "The Plan" does not, as the Bank argues, "continue[] in existence regardless of changes in funding or administration." Trust Company Reply Brief at 7. Section 1102 clearly shows that funding and administration are integral

parts of a "plan" under ERISA. However, as will be set out below, the Court finds that this mistake in terminology is not fatal to defendants' position on the ultimate outcome of this case.

It is plaintiff's primary contention that the Bank's written application for insurance, which was accepted and administered by Great West as though a written policy had been issued, is "the Plan" which governs the disposition of this case. The application, Gill Deposition, Exhibit 19, does contain the four required features of an ERISA "plan" as set out in section 1102(b). There is also no mention of any offset provisions in the application, and, therefore, plaintiff argues that he is entitled to the full $1,770 per month disability payment.

If only the provisions of the application for insurance were relevant here, the Court would be inclined to rule for

plaintiff. However, because of the admissible parol evidence existent here, the Court cannot do so.

Defendants' basis for asserting that the offset provisions set out in the plan which existed prior to the change to Great West is that all of the parties to the formulation of the new plan agreed that this would be the case. This contention is supported by the following evidence:

(1) The affidavit of Gregory Jon Allison, the group marketing officer of defendant Great West who negotiated the conversion on behalf of Great West, which states that:

> During the negotiations prior to and at the time the agreement was reached to commence coverage of the Plan under Great West's self-funding proposal, Great West and Trust Company Bank, through Mr. Hillegas [of Johnson & Higgins], agreed that the institution of this self-funding program would not alter the benefits available to employees under the Plan, and that the

benefit provisions of the Great West policy would remain consistent with the existing Plan with only two minor exceptions [which were set out above]....

Allison Affidavit, ¶4, Appendix Tab C, Defendant Great West's Appendix to its Statement of Undisputed Material Facts.

(2) The affidavit of W. Moses Bond, a group vice president of defendant Trust Company Bank, who engaged Johnson & Higgins to consult with the Bank regarding the change in insurance companies and plan administration. He states:

> The intention of Trust Company Bank in the transition from a plan insured by Northwestern National Life Insurance Company to a self-funded plan was that the terms of the plan itself would remain unchanged.... Specifically, the terms of the Plan with respect to deductions for income from other sources and the calculation of monthly benefits were to remain unchanged.

Bond Affidavit, ¶4, Trust Company's Motion for Summary Judgment, Exhibit B.

(3) The affidavit of James T. Hillegas, a vice president of Johnson & Higgins, who was primarily responsible for providing that firm's services to Trust Company in the conversion and negotiation process. He states:

> The intention of all of the parties to the transition from Northwestern National Life Insurance Company to the new funding arrangement was that the terms of the Plan itself would remain unchanged.... Specifically, the terms of the Plan with respect to deductions for income from other sources and the calculation of monthly benefits were to remain unchanged.

Hillegas Affidavit, ¶9, Trust Company's Motion for Summary Judgment, Exhibit C.

(4) The deposition testimony of Betty J. Gill, claims manager for Great West, who was informed

> at the time of the conversion that the terms of the Northwestern Plan were to be "duplicated" in the Great West Plan. Gill Deposition, pp.45-46.

Plaintiff argues that these statements should not be accepted by the Court because the application which the Bank sent to Great West contained the following language:

> It is hereby declared and agreed that all statements, representations and answers made in this application are a consideration for and a basis of the contract(s) of insurance between the Applicant and the Company and whether written or printed are declared to be true, full and complete; that no other statement, representation, or information shall be binding upon or affect the rights of the Company....

Plaintiff asserts that this language constitutes a merger clause that clearly bars the incorporation of the offset provisions of the Northwestern plan into the Great West plan, because there

is no mention of or reference to those provisions in the application. Plaintiff notes further that other portions of the Northwestern plan were specifically referred to in the application. Plaintiff's Brief at 3-4. Plaintiff, however, has offered no evidence to rebut the statements of the various affiants.

In the first place, as the Bank points out in its reply brief at page 11, the clause in question is not really a merger clause. It says that Great West is not bound by any statement not contained in the application, and it says that "all statements, representations and answers" made in the application are "true, full and complete." The clause does not state, as does the merger clause in Johnson v. Ford Motor Credit Co., 142 Ga. App. 547, 548 (1977), cited by plaintiff, that "[t]his contract constitutes the entire agreement between the parties...."

It is well settled in both Georgia and federal law that the evidence in the affidavits and depositions can be considered in a situation such as this. GEORGIA CODE ANN. §20-704(1) states:

> Parol Evidence is inadmissible to add to, take from, or vary a written contract. All the attendant and surrounding circumstances may be proved, and if there is an ambiguity, latent or patent, it may be explained; so if a part of a contract only is reduced to writing ..., and it is manifest that the writing was not intended to speak the whole contract, then parol evidence is admissible.

(Emphasis added.)

Georgia case law is even more clear on this point. The case of Forsyth Manufacturing Co. v. Castley, 112 Ga. 199, 211 (1900), held that

> a party is at liberty to prove "the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transactions between them.

(Citation omitted.) Accord, Hatley v. Frey, 145 Ga. App. 658, 659 (1978); Ansley v. Forest Services, Inc., 135 Ga. App. 745, 747 (1975). See also, Langenback v. Mays, 205 Ga. 706, 711 (1949).

Plaintiff himself points out that the application is "silent" as to the offset provisions. As there is admittedly no reference to these provisions, there is no way they can be considered "inconsistent" with the terms of the Trust Company-Great West contract. Finally, the "circumstances of the case" -- i.e., the aforementioned affidavits, the lack of many necessary terms and provisions in the application itself, and the fact that several draft plans have arisen during the course of this action -- certainly allow the Court to infer that the defendants "did not intend the document to be a complete and final statement of the whole of the transactions between them."

Federal law also supports consideration of this evidence. The Fifth Circuit has held that "[i]n Georgia, construction of insurance contracts begins with the premise that a policy must 'be construed so as to carry out the true intention of the parties. All other rules of contract interpretation and construction are subservient to that principle....'" National Hills Shopping Center, Inc. v. Liberty Mutual Insurance Co., 551 F.2d 655, 657 (5th Cir. 1977) (citation omitted). Furthermore,

> Extrinsic evidence may be even more helpful in deciding whether there has been an integration, and no rule bars "parol evidence" or any other relevant evidence for the purpose of determining whether the parties have agreed upon the writing as a complete and accurate statement of what is agreed between them.

Carolina Metal Products Corp. v. Larson, 389 F.2d 490, 493 (5th Cir. 1967). See also Vanston v. Connecticut General Life Insurance Co., 482 F.2d 337, 341 (5th Cir. 1973) (parol evidence rule did not prevent

plaintiff from proving additional insurance contract terms which were not inconsistent with those embodied in the written agreement); Matthews v. Drew Chemical Corp., 475 F.2d 146 (5th Cir. 1973).

The true intention of the parties to the insurance contract here was obviously to follow the offset provisions set out in the original Northwestern plan. Therefore, that is what the Court will allow. The Court FINDS that the plan which governs here is the combination of the application by the Bank to Great West and the benefit provisions of the original Northwestern plan (and not "the Plan" as defendants refer to it) which the defendants intended to be carried over into the new Great West plan. In particular, the Court HOLDS that the relevant offset provisions for "income from other sources" are those provisions contained in the original Northwestern plan set out above.

ERISA Violations

While it is true that 29 U.S.C. §1102(a)(1) requires that every employee benefit plan "shall be established and maintained pursuant to a written instrument," the Court has found no authority that states that this written instrument must be one all-inclusive document. Indeed, the legislative history indicates that Congress contemplated the possibility of more than one writing constituting an ERISA plan. The conference committee report states: "A written plan is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." 1974 U.S. Code Cong. & Ad. News, 5077-78 (emphasis added). Certainly, the statement in the application which plaintiff erroneously designated as a merger clause could cause confusion to a plan beneficiary as to

whether the Northwestern plan benefit provisions apply under the Great West plan. It is also true that "the plan" the Court has found to be controlling here is not a fully complete one, as evidenced by the fact that several subsequent draft plans have arisen and none has as yet been accepted as the final benefit plan. However, no employee of the Bank was ever told that any other provisions would apply, and the employees, including plaintiff, were furnished with copies of the Northwestern plan benefit provisions. Therefore, although the "written instrument" requirement was not met as perfectly as it could have been, the Court FINDS that there was no violation of this ERISA provision. Cf. Johnson v. Central States, Southeast & Southwest Areas Pension Fund, 513 F.2d 1173 (10th Cir. 1975) (though pension plan description in booklet furnished employee, together with plan

itself, was unsatisfactory, pension fund did not violate Welfare and Pension Plans Disclosure Act).

As the Court has set out "the plan" which is determinative of this case, and since defendants provided plaintiff with copies of both the Northwestern plan and the application which together contain all of the aspects of the Plan relevant to this action, the Court HOLDS that there was no violation by defendants of 28 U.S.C. §1132 for "refusal to supply requested information."

Do the Offset Provisions Apply to Plaintiff's Military Retirement Pay and VA Benefits?

The Court has decided that the offset provisions in the Northwestern plan document govern the disposition of this case. Plaintiff does not deny that the social security benefits he receives are covered by those offset provisions. Indeed, he

acknowledges that the maximum monthly benefit he is entitled to under the controlling document is $1,284.50 -- the $1,770 maximum less the $485.50 he was initially eligible to receive in social security benefits. Plaintiff's Brief at 12. Therefore, the Court must determine if plaintiff's military retirement pay and VA disability payments are covered under the plan's offset provisions.

The Court will first deal with the military retirement pay, because if those benefits are covered by the offset provisions, plaintiff would be over his $1,770 maximum monthly benefit regardless of whether the VA benefits are offset from the retirement pay or added to it.

The Court need look no further than the language of subsection (c) of the offset provisions, which states: "Any benefits the insured is eligible to receive from a retirement plan, pension

plan or any other similar plan for which the Insured's past or present employer has directly or indirectly sponsored, or for which such employer has paid any part of the cost or has made payroll deduction..." will be offset as "income from other sources" from benefits provided under the Bank's plan.

Plaintiff makes three arguments against the applicability fo this section to his military retirement pay. The first two -- that "[o]ffset (c) is, by its terms directed to retirement and pension plans (i.e., private retirement and pension arrangements establsihed by a trust or other plan document) of the type typically covered by ERISA," Plaintiff's Brief at 14, and that offset (c) is "related to private retirement and pension plans" and does not "relate to governmental retirement acts or laws," Id. at 16 -- are simply not supported by the language of

the offset provision. The court finds no distinction in (c) between plans established by a public employer and plans established by a private employer. Finally, plaintiff makes a creative argument that the, as he calls them, "limited offsets provided by subparagraphs (a) and (d)" would be rendered meaningless by giving a broad interpretation to offset (c) which would include the military retirement pay in question. Plaintiff's Reply Brief at 16-18. The Court is simply not persuaded that the construction given to these terms by plaintiff is correct.

The Court FINDS that the language of paragraph (c) above, clearly encompasses the military retired pay plaintiff is receiving. The benefits plaintiff is receiving are from a "retirement plan" for which plaintiff's past employer -- The

United States government -- has paid all of the cost.[4/]

Finally, the Court notes that plaintiff has filed a "notice of deposition upon written questions" for Mr. Marvin Lind, Director of Life and Disability of Northwestern National Life Insurance Company. Plaintiff's attorney indicates in his affidavit that he "has obtained [from an unnamed source at Northwestern] an oral interpretation indicating that the plaintiff's military retirement income would not be offset by Northwestern National against his basic disability benefit." Sims Affidavit, ¶4, Plaintiff's Appendix Tab 2. Apparently, the deposition testimony plaintiff hopes to obtain from Mr. Lind seeks in part to verify this assertion. See "Plaintiff's Direct Examination" question 18.

4/The Court also finds that the language in the provision in question is much more specific than that in the plan dealt with in Gladden v. Pargas, Inc. of Waldorf, Md., 579 F.2d 1901 (4th Cir. 1978), cited by plaintiff, and, therefore, that case's holding is of no bearing here.

The Court is not convinced that this testimony is relevant enough to its decision here to await completion of this deposition testimony. It was clearly the intention of the parties to the Great West plan that plaintiff's retirement pay be considered "income from other sources," see quoted sections of affidavits set out above, and the Court has found that subsection (c) can reasonably be interpreted to so include those benefits.

Therefore, as the Court has decided that plaintiff's military retired pay is covered by the Plan's offset provisions, and since at all times relevant to this action, plaintiff's combined social security benefits and military retired pay was greater than the $1,770 maximum monthly benefit for which he is eligible,[5/]

5/Plaintiff became eligible for benefits under the Plan on February 1, 1980. At that time he was (retroactively) receiving $485.50 per month in social security benefits and $1,642.86 per month in military retirement pay ($2,785.86 less $943.00 in VA benefits) for a total of $2,128.36 per month in income from other sources.

the Court HOLDS that plaintiff is only entitled to receive the $50 per month minimum benefit under the Bank's disability plan.

Also, as defendants have prevailed on the substantive issues, plaintiff's claims for attorney's fees and exemplary damages must also fail.

In sum, for the reasons set out in this opinion, the Court hereby:

GRANTS Plaintiff's motion to amend complaint;

GRANTS all defendants' motions for summary judgment; and

DENIES plaintiff's motion for summary judgment.

SO ORDERED, this 15th day of September, 1981.

ORINDA D. EVANS
United States District
Judge

[Filed Sept. 16, 1981]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 81-7858

D.C. Docket No. CV-80-1428-A

HAROLD L. MYRON,

Plaintiff-Appellant,

versus

TRUST COMPANY BANK
LONG TERM DISABILITY
BENEFIT PLAN, ET AL.,

Defendants-Appellees.

Appeal from the United States
District Court for the Northern
District of Georgia

(October 20, 1982)

Before JOHNSON and ANDERSON, Circuit Judges,

and HUNTER*, District Judge. PER CURIAM:

AFFIRMED. See Circuit Rule 25.

"Costs taxed against plaintiff-appellant."

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*Honorable Edwin F. Hunter, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

ISSUED AS MANDATE: JAN 13 1983
[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 81-7858

HAROLD L. MYRON,

Plaintiff-Appellant,

versus

TRUST COMPANY BANK
LONG TERM DISABILITY
BENEFIT PLAN, ET AL.,

Defendants-Appellees.

Appeal from the United States
District Court for the Northern
District of Georgia

ON PETITION FOR REHEARING

Before JOHNSON and ANDERSON, Circuit Judges, and HUNTER*, Judge. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
United States Circuit Judge

*U.S. District Judge for the Western District of Louisiana, sitting by designation.

[Filed Dec. 1, 1982]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF GEORGIA
ATLANTA DIVISION

HAROLD L. MYRON	:	CIVIL ACTION FILE
	:	NO. C80-1428A
vs.	:	
	:	
TRUST COMPANY BANK LONG TERM DISABILITY BENEFIT PLAN, TRUST COMPANY BANK, GREAT WEST LIFE ASSURANCE COMPANY	:	JUDGMENT

This action came on for consideration before the Court, Honorable Orinda D. Evans, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, pursuant to Order of September 16, 1981

It is Ordered and Adjudged that plaintiff take nothing; that the action be dismissed; and that defendants TRUST COMPANY BANK LONG TERM DISABILITY BENEFIT PLAN, TRUST COMPANY BANK, GREAT WEST LIFE ASSURANCE COMPANY recover of plaintiff HAROLD L. MYRON their costs of this action.

Dated at Atlanta, Georgia, this 21st day of September, 1981.

FILED AND ENTERED
IN CLERK'S OFFICE
September 21, 1981
BEN H. CARTER, CLERK

BY: _____
Patricia M. Ivester
Deputy Clerk

BEN H. CARTER
Clerk of Court

BY: _____
Patricia M. Ivester
Deputy Clerk

EMPLOYEE RETIREMENT INCOME SECURITY ACT
TITLE I, SUBTITLE A, §2
29 U.S.C. §1001

§1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce

because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment

are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards

of conduct, etc. for fiduciaries. It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance. It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests

of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

EMPLOYEE RETIREMENT INCOME SECURITY ACT
TITLE I, SUBTITLE A, §3(a)
(2)(A), (7) and (14)
29 U.S.C. §1002

§1002. Definitions

For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organizatio or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries through the purchase of insurance or

otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 [29 U.S.C. §186(c)] (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstnaces such plan, fund, or program--

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan...

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit...

(14) The term "party in interest" means, as to an employee benefit plan--

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan....

EMPLOYEE RETIREMENT INCOME SECURITY ACT
TITLE I, SUBTITLE B, PART 1,
§104(b)(1) and (4)
29 U.S.C. §1024

§1024. Filing and furnishing of information

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan. Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary, plan description, and all modifications and changes

referred to in section 102(a)(1) [29 U.S.C. §1022(a)(1)]-

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part....

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a

reasonable charge to cover the cost of furnishing such complete copies. The Secretary may be [sic] regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence....

EMPLOYEE RETIREMENT INCOME SECURITY ACT
TITLE I, SUBTITLE B, PART 4,
§402(a) AND (b)
29 U.S.C. §1102

§1102. Establishment of plan

(a) Named fiduciaries. (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this title, the term "named fiduciary" means a fiduciary who is named in the plan instrument,

or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan. Every employee benefit plan shall-

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this title,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 405(c)(1) [29 U.S.C. §1105(c)(1)]),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan....

EMPLOYEE RETIREMENT INCOME SECURITY ACT
TITLE I, SUBTITLE B, PART 4, §404(1)
29 U.S.C. §1104

§1104. Fiduciary duties

(a) Prudent man standard of care.

(1) Subject to sections 403(c) and (d) [29 U.S.C. §1103(c) and (d)], 4042 [29 U.S.C. §1342], and 4044 [29 U.S.C. §1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(a) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent

with the provisions of this title or title IV.

EMPLOYEE RETIREMENT INCOME SECURITY ACT
TITLE I, SUBTITLE B, PART 4, §409(a)
29 U.S.C. §1109

§1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through the use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act [29 U.S.C. §1111].

EMPLOYEE RETIREMENT INCOME SECURITY ACT
TITLE I, SUBTITLE B, PART 5, §501
29 U.S.C. §1131

§1131. Criminal penalties

Any person who willfully violates any provision of part 1 of this subtitle [29 U.S.C. §§1021 et seq.], or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.

EMPLOYEE RETIREMENT INCOME SECURITY ACT
TITLE I, SUBTITLE B, PART 5
§502(c) and (g)
29 U.S.C. §1132

§1132. Civil enforcement

...

(c) Administrator's refusal to supply requested information. Any adminis-

trator who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper....

(g) Attorney's fees and costs; awards in actions involving delinquent contributions. (1) in any action under this title (other than an action described in paragraph 2) by a participant, benefi-

ciary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

EMPLOYEE RETIREMENT INCOME SECURITY ACT
TITLE I, SUBTITLE B, PART 5,
§514(a) and (c)
29 U.S.C. §1144

§1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. §1003(a)] and not exempt under section 4(b) [29 U.S.C. §1003(b)]. This section shall take effect on January 1, 1975...

(c) Definitions. For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having

the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality or either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

UNITED STATES CONSTITUTION,
ARTICLE VI, SECTION 2

...

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Office-Supreme Court, U.S.
FILED
MAY 20 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1482

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HAROLD L. MYRON,

Petitioner,

v.

TRUST COMPANY BANK LONG-TERM DISABILITY BENEFIT PLAN, TRUST COMPANY BANK and GREAT-WEST LIFE ASSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS TRUST COMPANY BANK AND TRUST COMPANY BANK LONG-TERM DISABILITY BENEFIT PLAN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the District Court properly consider extrinsic evidence to identify the written documents containing the terms of the Trust Company Bank Long-Term Disability Benefit Plan?

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IN THE

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OCTOBER TERM, 1982

HAROLD L. MYRON,

Petitioner,

v.

TRUST COMPANY BANK LONG-TERM DISABILITY BENEFIT PLAN, TRUST COMPANY BANK AND GREAT-WEST LIFE ASSURANCE COMPANY,[1]

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

[1] Trust Company Bank is a wholly owned subsidiary of Trust Company of Georgia. All but one of the affiliates of Trust Company Bank also are wholly owned subsidiaries of Trust Company of Georgia. The sole affiliate that is not wholly owned is The First National Bank of Wayne County (Jesup). *See* Supreme Court Rule 28.1.

BRIEF IN OPPOSITION OF RESPONDENTS TRUST COMPANY BANK AND TRUST COMPANY BANK LONG-TERM DISABILITY BENEFIT PLAN TO PETITION FOR WRIT OF CERTIORARI

The opinion of the District Court and the judgment of the Court of Appeals are reproduced in petitioner's Appendix. These respondents accept petitioner's Statement of Jurisdiction and of the statute involved, with the exception that this case does not involve the Supremacy Clause of the United States Constitution, Article VI, §2.

STATEMENT OF THE CASE

Petitioner fairly sets forth the proceedings in the courts below insofar as they relate to the issues here.[2] Petitioner's statement of facts, however, is misleading and incomplete, and therefore these respondents set forth below their own statement of facts.

The dispute in this case involves the amount of benefits to which petitioner is entitled under a disability benefit plan. Petitioner, a former employee of Trust Company Bank ("Trust Company"), became disabled shortly after Trust Company changed the funding procedure for its employee disability plan. Petitioner and

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[2] The facts of the case are set forth in detail in the opinion of the district court in petitioner's Appendix. One typographical error appears in the district court opinion. The plaintiff became eligible for and began receiving military retired pay as of August 1, 1973, rather than 1979. [Pet. App. A-4].

Trust Company disagree as to whether the provisions of the plan authorize Trust Company to offset his military retirement pay against the amount of his benefits.

Prior to 1976, Trust Company initiated for its employees a long-term disability benefit plan. From July 15, 1975 through April 30, 1979, the Trust Company Bank Long-Term Disability Benefit Plan ("the Plan") was insured under a policy issued by Northwestern National Life Insurance Company ("Northwestern"). All of the substantive benefit provisions of the Plan and all of the insurance provisions of the insurance policy were set forth in one document ("the Northwestern Document"). Under this funding arrangement, Trust Company funded the payment of Plan benefits by paying insurance premiums to Northwestern. Northwestern, as an insurance company, then processed claims for Plan benefits and paid those claims that satisfied the requirements of the Plan.

In September of 1978, Great-West Life Assurance Company ("Great-West") submitted to Trust Company's insurance consulting firm, Johnson & Higgins of Georgia, Inc. ("Johnson & Higgins") a proposal recommending that the Plan convert from an insured status to a self-funded status, employing Great-West to provide administrative services such as claim processing. The basic provisions of this proposal were eventually accepted by Trust Company as of May 1, 1979. On that date, Trust Company contracted with Great-West to convert the funding of the Plan from an insured to a self-funded status, with claims adjudication and fund management services to be provided by Great-West.

The substantive benefit provisions of the Plan continued to be set forth in the Northwestern Document. In connection with the conversion of the Plan from one insured by Northwestern to one that was self-funded by Trust Company with administrative services to be provided by Great-West, Great-West undertook to prepare a revised plan document, reflecting the changes in funding and administration. At the time of the conversion, a document entitled "Application for Group Insurance" ("the Application") was submitted by Trust Company to Great-West. The Application consisted of several Great-West forms, to which excerpts from the Northwestern Document and the Plan's summary plan description were attached.

Three parties were involved in converting the Plan from an insured status to a self-funded status: Trust Company, Johnson & Higgins, and Great-West. The individuals who were responsible on behalf of these parties for handling the conversion swore by affidavit that the parties intended for the substantive benefit provisions of the Plan to remain unchanged, except for two slight liberalizations not applicable to petitioner.[3] This testimony was not rebutted.

After the conversion of the Plan from an insured status to a self-funded status, Great-West produced several drafts in an effort to restate accurately in one document the Plan's unchanged substantive benefit

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[3] This testimony also is supported by the deposition testimony of the Great-West claims manager responsible for processing petitioner's claim, who testified that she was informed at the time of the conversion that the terms of the Plan were to remain unchanged.

provisions and the new funding and administrative arrangement. These drafts were not approved or executed by Trust Company.

Petitioner retired from the United States Army as a full colonel in June 1973 after thirty years service. At that time, he became eligible for and began receiving military retirement pay. From July 1973 through August 1, 1979, petitioner was an employee of Trust Company. Three months after the change in funding, petitioner retired from Trust Company due to total and permanent disability effective August 1, 1979.[4] At the time of his retirement, petitioner was advised by Trust Company that his benefits would be reduced by the amount of his military retirement pay.

After receiving short-term benefits for the six-month period provided in the Plan, petitioner submitted a claim for long-term benefits under the Plan to Great-West. The claims manager who reviewed his claim testified that she made an error in calculating the amount of his benefits, and, as a result, petitioner's military retirement pay was not deducted from his monthly benefit. This mistake was detected by Trust Company, which informed both Great-West and petitioner of the error.

Through his attorney, petitioner subsequently requested a copy of the Plan from Trust Company.

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[4] Petitioner also became eligible by reason of his disability to receive 100 per cent service-connected Veterans Administration disability payments. As of March 31, 1981, petitioner was receiving VA disability, social security disability, and military retirement pay totaling at least $3,875 per month or at least $46,500 per year.

Trust Company responded by furnishing the petitioner with a copy of the Northwestern Document, which Trust Company then considered to be the Plan document.[5] During the course of the litigation, petitioner also was furnished with a copy of the Application.

The substantive benefit provisions of the Plan, as set forth in the Northwestern Document, provide that an employee who is eligible to receive long-term disability income benefits shall have offset against those benefits certain "Income From Other Sources." "Income From Other Sources" is a defined term, which includes:

> (c) Any benefits the Insured is eligible to receive from a retirement plan, pension plan or any other similar plan for which the Insured's past or present employer has directly or indirectly sponsored, or for which such employer has paid any part of the cost or has made a payroll deduction. [Pet. App. A-8].

While the page of the Northwestern Document containing this provision was not attached to the copy of the Application contained in the Record, the Application does contain references to "Income from Other Sources", and Trust Company and Great-West at all times intended the offset provisions to remain in force.

Petitioner contended below that the quoted language did not encompass military retirement pay. He also contended that the operative plan document was not the Northwestern Document, but rather that his

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[5] Trust Company maintained the position that the Northwestern Document was the Plan document throughout the litigation.

entitlement to benefits was governed solely by the Application.

The respondents contended, and the district court found, that the calculation of petitioner's benefits is governed by the section of the Northwestern Document quoted above, and that petitioner's military retirement pay is "Income From Other Sources" as defined in subparagraph (c) of that section. Accordingly, the district court granted summary judgment to Trust Company, the Plan, and Great-West. The court of appeals affirmed per curiam without written opinion.

REASONS WHY THE WRIT SHOULD BE DENIED

I. SUMMARY OF ARGUMENT

Petitioner inaccurately characterizes the issue presented in this case as whether the Georgia parol evidence rule supersedes the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001, *et seq.*). In fact, the question before the district court was to identify the documents that constituted the Plan, and then to interpret those documents. The court in its thoughtful and detailed opinion did just that.

ERISA does not require that all terms of a plan be contained in a single integrated document. In fact, certain provisions of the Act contemplate that a plan's terms can be provided in multiple documents.

The district court did not modify the terms of the written plan by parol evidence. Rather, the court merely referred to extrinsic evidence to determine which documents constituted the Plan. Having made that determination, the court looked solely to the writings to decide petitioner's entitlement to benefits.

This case does not present questions satisfying the criteria of Supreme Court Rule 17. It is fact-specific, and no important questions of federal law are raised. The district court merely applied well-settled rules of statutory and contract interpretation to determine which documents under these circumstances constituted the Plan and defined petitioner's benefits.

II. ARGUMENT

A. ERISA Does Not Require a Single Integrated Plan Document.

Petitioner's argument is based upon the ERISA requirement that a plan be maintained pursuant to a written instrument and contain certain minimum elements. Petitioner here attempts to expand these requirements far beyond the statutory language. He incorrectly attempts to convert the minimum requirements of ERISA into a very different proposition: that a document (the Application) that happens to contain four of the elements thereby becomes the plan document. Moreover, petitioner contends that ERISA automatically converts such a document, whatever it may have been intended to be, into a totally integrated instrument, so that no other documents may be consulted or considered to define the terms of an employee benefit plan. The statute does not support such a rigid and distorted interpretation.

Petitioner points to no provision of ERISA that supports his extraordinary proposition that a document not intended by any of the parties to reflect the Plan contains *all* of the terms of the Plan. ERISA does not establish any specific requirement as to the formal nature of the documents pursuant to which a plan is to be maintained, and it does not impose any formalities or any requirements contrary to the district court's ultimate resolution of this case. To the contrary, some portions of ERISA anticipate that the plan "instrument" may consist of several documents. *See, e.g.*, 29 U.S.C. § 1024(b)(4) (administrator must supply "other *instruments* under which the plan is established or op-

erated.") (emphasis added.)[6] ERISA establishes a regulatory framework and specifies certain minimum requirements. It does not, however, dictate the formalities petitioner seeks to impose.

The petitioner's argument that the district court's opinion is in conflict with ERISA ignores the analysis performed by the court. The district court did not interpret a plan with terms partially in writing and partially in parol. The district court concluded that this Plan, insofar as it affects the petitioner, is maintained pursuant to at least two written documents: the Application and the Northwestern Document. Those documents, taken together, provide a full and complete explanation of the Plan, and, taken together, they fully comply with ERISA requirements.

Petitioner's argument is premised on a false assumption; *i.e.*, that, under ERISA, the Application is the only document that can and does contain the terms of the Plan. This assumption ignores the general structure of the Act. ERISA establishes certain minimum restrictions and standards, but it leaves the remaining details of individual plans to the private parties. *Cf. Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981) (In context of vested pension benefits, "[t]hat the private parties, not the Government, control the level of benefits is clear from the statutory language defining nonforfeitable rights as well as from other

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[6] Petitioner himself quotes portions of the legislative history referring to plan "documents and instruments." *See* Petition at 14 n.5, 15. *See also* Department of Labor Opinion Letter, No. 75-87, dated Sept. 18, 1975 (Section 1102(a)(1) does not specify what formality is necessary in the establishment of the written instrument; cross-references to other documents are permissible). [A-1].

portions of ERISA."). Among the formalities left to the parties is the structure of the plan documents. ERISA does not require a single, integrated document, and the district court's opinion is not in conflict with ERISA.

B. Petitioner Mischaracterizes the District Court's Use of Parol Evidence

Petitioner asserts that the district court improperly applied parol evidence to modify the terms of the Plan. The district court did no such thing. In fact, the district court properly used extrinsic evidence to determine under what written documents the Plan was established and maintained. Having done that, the court then looked at those written documents to determine the benefits provided petitioner under the Plan. Such an application of extrinsic evidence in no way violates the parol evidence rule as it universally is articulated.

The district court's use of extrinsic evidence is supported by the customary rules of parol evidence and contract interpretation. The district court quite properly examined all of the evidence to determine the intention of the parties as to what documents constituted the Plan. Petitioner's effort to bar this evidence by the misapplication of the parol evidence rule fails to recognize both the purpose and the substance of that rule. The parol evidence rule does *not* bar the district court's use of extrinsic evidence to determine what documents the parties intended to be the manifestation of their agreement. As Judge Learned Hand once explained:

> [A] writing is conclusive only so far as the parties intend it to be the authoritative memorial of the transaction. Whatever the presumptions, their actual understanding may always be shown except in so far as expressly or implicitly they have agreed that the writing alone shall control.

In re H. Hicks & Son, 82 F.2d 277, 279 (2d Cir. 1936).

Before the parol evidence rule can operate to bar evidence of the intention of the parties,

> the first question is whether the writing fulfills this function [to state fully the agreement of the parties] so as to be an integration of the parties understanding. . . . To answer this question a court should consider the writing as well as the circumstances surrounding its execution, . . . and parol and extrinsic evidence may be used in making this determination."

Brown v. Financial Service Corporation, International, 489 F.2d 144, 149 (5th Cir. 1974) (citations omitted). *See also* 3 A. Corbin, *Corbin on Contracts* § 577 (1960).

Petitioner attempts to give the Application a status that none of the parties who created that document intended. This attempt totally ignores the established rule of construction of contracts, which provides a useful analogy. "[C]onstruction of insurance contracts begins with the premise that a policy must 'be construed so as to carry out the true intention of the parties. *All other rules of contract interpretation and construction are subservient to that principle . . .*'" *National*

Hills Shopping Center, Inc. v. Liberty Mutual Insurance Co., 551 F.2d 655, 657 (5th Cir. 1977) (citations omitted) (emphasis added). "[N]o rule bars 'parol evidence' or any other relevant evidence for the purpose of determining whether the parties have agreed upon a writing as a complete and accurate statement of what is agreed upon between them." *Carolina Metal Products Corp. v. Larson*, 389 F.2d 490, 493 (5th Cir. 1968). *See Vanston v. Connecticut General Life Insurance Co.*, 482 F.2d 337, 340-41 (5th Cir. 1973).

Petitioner's assertion that the district court applied the parol evidence rule of Georgia to supersede ERISA is inaccurate and misleading.[7] The use of extrinsic evidence to determine what documents constitute the entire agreement between the parties is a standard principle of both federal and state law, and the district court cited both federal and state cases in support of its decision. [Pet. App. A-24-27]. Petitioner has pointed to no conflicting federal decisions, nor has he identified any statutory provision in ERISA that suggests that well-settled and well-accepted principles of contract interpretation should not apply to the construction of the written provisions of employee benefit plans. *See* Restatement (Second) of Contracts §§ 209-214 (1979).

Despite his characterization of the question presented, petitioner does not seek to show that the

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[7] Indeed, petitioner argued below, and suggests here at p. 16 n.7 of the Petition, that the Georgia parol evidence rule applied to his case and barred the evidence of the parties' intention. In addition, petitioner contends that "the permissible use of parol evidence . . . is much more limited in Georgia than in most states." [Petition at 23].

Georgia parol evidence rule is in conflict with ERISA, because the parol evidence rule is inapplicable to this case under any articulation of the rule. Rather, petitioner seeks to create a new exclusionary rule that goes far beyond the parol evidence rule.[8]

C. This Case Does Not Present Substantial Unresolved Questions of Federal Law

This case presents narrow and fact-specific issues. The district court was presented with a relatively routine question of identifying operative documents and then interpreting those documents in order to determine petitioner's benefits. Its decision, particularly in light of the unique facts, raises no serious or novel federal questions. In making its determination, the court followed well-established rules of statutory and contract interpretation.

Petitioner argues that ERISA, by operation of law, somehow converts a document that happens to contain four of the minimum informational requirements set forth in a single section of the Act into a fully integrated and complete record of the parties' intention. Moreover, he seeks to exclude unrebutted evidence that none of the parties had any such intention.

The district court's use of extrinsic evidence to identify the applicable governing documents was not in conflict with the spirit or the letter of ERISA. No fed-

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[8] In this context, parol evidence always is necessary, at least to identify the plan document. At a minimum, even when the applicable document is not in dispute, its identification and authentication always would be by reference to extrinsic evidence.

eral policy is contravened by an accurate determination of the governing plan documents, all of which were in writing. As noted, both the statute and the legislative history clearly contemplate that an ERISA plan can consist of more than a single document. The federal interest is best served by avoiding the creation of overly technical rules that can turn appropriate and authorized acts into "technical" violations, thereby creating unintended windfall benefits to otherwise ineligible claimants. The orderly administration of ERISA requires that the courts be free to utilize established rules of construction to identify and interpret ERISA plan documents. Any other rule would create confusion and not serve any countervailing federal interests.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A-1

P/OPINION 75-87

402

September 18, 1975

Gentlemen:

This is in response to your letter dated June 3, 1975, to the Secretary of Labor in which you ask whether an enclosed written instrument is sufficient to comply with the Employee Retirement Income Security Act of 1974 (ERISA). You also ask how to obtain any rules and regulations, including reporting forms, adopted under the Act.

Regarding the written instruments, it appears that you are asking whether it satisfies the requirement of ERISA section 402(a)(1) that an employee benefit plan be established and maintained pursuant to a written instrument. This section of the Act does not specify who must establish the written instrument and what formality is necessary in its establishment. However, section 402 says that "Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan."

Also, the Conference Report on the Act says, on page 297, the following:

> A written plan is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan. Also, a written plan is required so the employees may know who is responsible for

operating the plan. Therefore, the plan document is to provide for the "named fiduciaries" who have authority to control and manage the plan operations and administration.

Based on the above references to section 402 and the Conference Report, a written instrument under section 402 must be established by a person or entity which has authority to designate a "named fiduciary" and to describe the rights and obligations of persons covered by the plan. A cross-reference, or incorporation by reference, to another plan document would be permissible if the other document serves to fulfill the purposes of section 402(a)(1). For example, where rights to plan benefits are governed by the terms of an insurance contract, a reference to the contract would be appropriate.

Regarding the formality in establishing the written instrument, section 402(a)(1) and the Conference Report indicate that the instrument must have the status of an official document of the plan. Execution of the instrument by the plan sponsor, acting as such, would serve this purpose.

Due to the limited resources of this office, we are not able to review plan documents upon request for the purpose of determining whether they meet all requirements of the law. However, I hope that the information provided will be helpful in understanding some basic aspects of the written instrument requirement.

Copies of issuances and reporting forms implementing ERISA may be obtained by contacting the Information Office of the Labor-Management Services Administra-

tion, U. S. Department of Labor, Washington, D. C. 20216 (phone number (202) 523-7408). For your convenience, I am enclosing a copy of recently issued regulations on the reporting and disclosure requirements and a copy of Plan Description Form EBS-1.

Sincerely,

Office-Supreme Court, U.S.
FILED
MAY 20 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1482

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HAROLD L. MYRON,

Petitioner,

v.

TRUST COMPANY BANK LONG-TERM DISABILITY BENEFIT PLAN, TRUST COMPANY BANK and GREAT-WEST LIFE ASSURANCE COMPANY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF OF RESPONDENT THE GREAT-WEST LIFE ASSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court review a decision by the United States Court of Appeals for the Eleventh Circuit affirming a District Court's holding that the provisions of an employee benefit plan covered by ERISA and maintained by the Respondents were contained in more than one document, where all of the provisions in question were in writing, were agreed upon the contracting parties, and were intended to be part of the plan?

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TRUST COMPANY BANK LONG TERM DISABILITY BENEFIT PLAN, TRUST COMPANY BANK and GREAT-WEST LIFE ASSURANCE COMPANY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF OF RESPONDENT THE GREAT-WEST LIFE ASSURANCE COMPANY* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent The Great-West Life Assurance Company (hereinafter "Great-West") respectfully requests

* In accordance with Rule 28.1, The Great-West Life Assurance Company shows that its parents, subsidiaries and affiliates are: The Great-West Life Annuity Insurance Company and Vesma Services, Incorporated (both U.S. corporations) and the

that this Court deny the petition for writ of certiorari seeking to review the judgment of the United States Court of Appeals for the Eleventh Circuit, affirming without opinion the judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, in *Myron v. Trust Company Bank Long Term Disability Benefit Plan*, 522 F. Supp. 511 (1981); *aff'd*, 691 F.2d 510 (11th Cir. 1982).

OPINION AND JUDGMENT BELOW

The judgment of the Court of Appeals and the opinion of the District Court below are accurately identified in the petition, and are reproduced on pages A-2 through A-41 of the Appendix to the petition.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

No statutes or constitutional provisions not identified in the petition are involved in this case.

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following Canadian entities: Gold Circle Insurance Company; Place Bonaventure, Inc.; Place Bonaventure [South], Inc.; Cambridge Leaseholds, Ltd.; River East Developments, Ltd.; Torwest Properties, Ltd.; The Investors Group; and Power Corporation of Canada.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in the Court Below.

Petitioner, Harold L. Myron, filed this action in August 1980 against Respondents Trust Company Bank ("Trust Company"), Trust Company Bank Long-Term Disability Benefit Plan ("the Plan"), and Great-West Life Assurance Company ("Great-West"). Petitioner, an ex-employee of Trust Company, sought to recover from Respondents monthly benefits under the Plan in the amount of $1,284.50, plus attorneys' fees and certain statutory damages under the Employee Retirement Income Security Act of 1974 (29 U.S.C. §1001, *et seq.*). Respondents answered denying the above-described allegations. Subsequently, Petitioner amended his complaint to increase his claim for monthly benefits to the amount of $1,770.

Following the completion of discovery, Respondents each moved for summary judgment. Petitioner responded to those motions by filing his own motion for summary judgment. On September 16, 1981, the Honorable Orinda Evans of the United States District Court for the Northern District of Georgia entered an order granting each respondent's motion for summary judgment and denying Petitioner's motion. Judgment was entered in accordance with that order, and Petitioner appealed to the Eleventh Circuit. After receiving briefs and hearing oral argument, the Eleventh Circuit Court of Appeals affirmed the District Court's judgment without opinion pursuant to Circuit Rule 25 (reproduced at A-1 of Appendix to petition) and subsequently denied Petitioner's motion for rehearing.

II. Statement of Facts

Petitioner served in the military for thirty years and retired from the United States Army as a full Colonel in June 1973. From July 1973 through August 1, 1979 Petitioner was employed by Respondent Trust Company. He retired from Trust Company due to total and permanent disability effective August 1, 1979. At the time of his retirement, Petitioner's basic salary with Trust Company was $35,400 per year.

Petitioner had been receiving military retirement pay since August 1, 1973. Effective April 1, 1978, he became eligible for and began to receive disability benefits from the Veterans Administration ("VA"). Effective September 1, 1979, Petitioner became eligible to receive 100 percent service-connected VA disability payments. Both the military retirement and the VA disability benefits increased between the time of Petitioner's original eligibility and the filing of the complaint in this action. Effective January 1, 1980, Petitioner also began receiving Social Security benefits in the amount of $485.50 per month. As of March 31, 1981, Petitioner was receiving VA disability, Social Security disability, and military retirement pay totaling at least $3,875 per month or at least $46,500 per year.

At all times relevant to this action, Respondent Trust Company sponsored for its employees a long-term disability benefit plan. From July 15, 1975 through April 30, 1979, the Plan was funded through an employee group long-term disability income insurance policy with Northwestern National Life Insurance Company ("Northwestern").

In September of 1978, Respondent Great-West submitted to Johnson & Higgins of Georgia, Inc. (an insurance consulting firm) a proposal containing its funding recommendation for a long-term disability benefit plan for Trust Company. The basic provisions of this proposal were eventually accepted by Trust Company as of May 1, 1979. Effective May 1, 1979, Trust Company contracted with Great-West to convert the funding of the Plan to a self-funded program with claims adjudication and fund management services to be provided by Great-West.

At the time the agreement was reached between Trust Company and Great-West to replace the Northwestern policy with Great-West's self-funding mechanism on May 1, 1979, no document (or even a draft of a document, other than the original proposal submitted by Great-West in September 1978) describing the self-funding program had yet been developed. Prior to May 1, 1979, Trust Company and Great-West had agreed that the benefit terms of the existing plan would not be altered by the changeover to self-funding, and that the benefit provisions in the Northwestern plan document would continue to govern all determinations relating to employee coverage, benefits and payments, with only two exceptions (neither of which is relevant to this case).

The Northwestern plan document contained a provision relating to offsets to benefits under the Plan which provided that a Plan participant's benefits were to be reduced by "income from other sources" including (as interpreted by the District Court below) mili-

tary retirement pay and Social Security benefits.[1] When applied to Petitioner, these "offsets" greatly exceeded $1,770 per month, which was the maximum amount of monthly benefits for which Petitioner would have been eligible under the Plan, had he been receiving no "income from other sources."

The pages from the Northwestern plan document defining offsets for income from other sources apparently were inadvertently omitted from the attachments to a document entitled "Application for Group Insurance" (hereinafter the "Application") submitted by Trust Company to Great-West in connection with the changeover to the Great-West self-funding mechanism. The Application does contain references to "income from other sources," but that term is not defined within the Application itself. At no time prior to Petitioner's retirement due to his total disability was he ever provided with a copy of the Application, nor was he even aware of its existence. Petitioner saw the Application for the first time only after this litigation commenced.

The decision to change the funding of the Plan from an insured plan to a self-funded arrangement was a contractual matter between Trust Company and Great-West. The contracting parties agreed that the benefit provisions of the existing Plan document would

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[1] In the courts below, Petitioner contended that the offset provisions of the Northwestern plan document should be interpreted in such a way that his receipt of military retirement and disability pay did not have the effect of reducing his Plan benefits. Both the District Court and the Eleventh Circuit rejected Petitioner's argument on this point, however, and Petitioner has not raised it as an issue in his petition.

continue in effect (with the two exceptions previously mentioned which are not relevant to this case). The affidavits of all parties to the negotiations established that the contracting parties (Trust Company and Great-West) were in complete agreement as of May 1, 1979 and at all times thereafter that the Northwestern plan document's benefit offset provisions would continue in effect. Petitioner was never informed that any other document or any other benefit or offset provision would apply.

As of May 1, 1979 and at all relevant times thereafter, it is undisputed that there was a complete meeting of the minds between Trust Company and Great-West with regard to the provisions of the Plan; the agreement was that the existing Northwestern plan document's benefit provisions (including the offsets for income from other sources) would continue to apply. At no time prior to his becoming totally disabled was Petitioner ever provided with any document or any communication stating or suggesting that the Northwestern plan document benefit and offset provisions were no longer in effect.

REASONS FOR DENYING THE WRIT

Summary of Argument

The writ should be denied because the considerations listed in Rule 17.1 of the Rules of this Court are not present in this case. There are no special or important reasons for granting the writ. No important question of federal law is involved. There exists no conflict between the decision below and the decision of any

other federal court of appeals or of this Court, and Petitioner has not suggested that any such conflict exists. As the Eleventh Circuit Court of Appeals recognized in affirming the District Court's decision without opinion, an opinion in the case would have no precedential value with regard to any issue of federal constitutional or statutory significance.

In addition, the writ should be denied because the decision below was clearly correct on the merits and was not contrary to ERISA, the United States Constitution, or any applicable decisions of this Court or any federal appellate court. The Petitioner has mischaracterized the holding below by implying that the Eleventh Circuit and the District Court concluded that the Georgia parol evidence rule "superseded" ERISA so that a plan required to be in writing under ERISA need not actually be entirely in writing. To the contrary, the courts below held only that an employer's ERISA plan need not be contained solely within the confines of a *single document* and that undisputed parol evidence could be used to determine which documents constituted the entire plan. The result below was especially appropriate because there was no factual dispute over the intent of the contracting parties and no plan documents provided to Petitioner while he was an employee were inconsistent with the benefit provisions which Respondents believed and the courts below found to be part of the Plan. Both courts below correctly rejected Petitioner's position and Respondent Great-West respectfully submits that there is no reason for this Court to grant the petition for writ of certiorari.

ARGUMENT

I. None of the Considerations of Rule 17 pertaining to Review on Certiorari are Present in this Case.

As stated in Rule 17.1 of this Court's Rules, a review on writ of certiorari "will be granted only when there are special and important reasons therefor." No such reasons are present in this case. The decision of the Eleventh Circuit Court of Appeals affirming without opinion the District Court's decision is not in conflict with any decision of any other federal court of appeals, nor does it conflict with any decisions of this Court, nor does it decide an important question of federal law which should be settled by this Court.

In an attempt to create the appearance of an important federal issue in this case, Petitioner has stated his "question for review" in a way that mischaracterizes the decisions of the District and Circuit courts below by suggesting that those decisions were based on an allegedly erroneous legal conclusion with regard to an issue which was not even involved in those decisions. Even a cursory review of the District Court opinion establishes that the Court did not hold that the Georgia parol evidence rule "supersedes" ERISA, as suggested by Petitioner's question for review. Moreover, contrary to the impression created by Petitioner, the respective courts below did not hold that provisions of an employee benefit plan covered by ERISA may be created or added to a plan by parol evidence notwithstanding ERISA's requirement that plans be "in writing", but held only that parol evidence could be and was prop-

erly used to determine which written provisions of which documents together constituted the Plan.[2]

The District Court undoubtedly found the particular facts of the case to be very significant in deciding that parol evidence could be used to help determine which provisions of which documents constituted the Plan, where the undisputed intent of the parties in setting up the Plan was to include in it the provisions now sought to be avoided by Petitioner. First, as the District Court held, there was no factual dispute that the contracting parties (Great-West and Trust Company) who negotiated and implemented the switch to the self-funding plan mechanism at all times intended to include the benefit offset provisions contained in the Northwestern plan document in the Plan that became effective May 1, 1979. Second, Petitioner has never contended that any benefit offset provisions inconsistent with those in the Northwestern plan document were communicated to him while he was an employee of Trust Company. Third, as is clear from the District Court's opinion, the "Application for Group Insur-

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[2] In the courts below, Petitioner argued that the Georgia parol evidence rules should be applied to preclude consideration of extrinsic evidence concerning the intent of the parties to include the Northwestern plan document's benefit offset provisions in the Plan effective May 1, 1979. In fact, Petitioner contended below, and continues to maintain, that the permissible use of parol evidence is more limited under Georgia law than in most states. Petition at 23. Having been unsuccessful on this issue in both courts below, however, Petitioner has reversed his field and now argues that under the supersedure provision of ERISA (29 U.S.C. § 1144) the District Court was *prohibited* from considering the Georgia parol evidence rule in determining whether extrinsic evidence could be admitted to identify which documents constituted the Plan.

ance" which petitioner contends constituted the *entire* plan document was obviously incomplete on its face. In fact, the Application contained certain references to "income from other sources" but did not at any point define or explain what that term meant. Fourth, the benefit offset provisions which the courts below found to be part of the Plan were at all relevant times included in writing in the documents which Trust Company and Great-West believed to constitute the plan documents.

In view of the unusual controlling facts in the case, the District Court's decision (or a decision by this Court) is unlikely to have any significant precedential value with regard to any important issue of federal or state law. In fact, the Eleventh Circuit Court of Appeals expressly recognized as much by affirming the District Court's decision under the Circuit's rule which allows affirmance without opinion if the Court determines that "no error of law appears and an opinion would have no precedential value, . . ." Rules of the U.S. Court of Appeals for the Eleventh Circuit, Rule 25 (page A-1 of Appendix to petition).

II. The Decisions of the District Court and Court of Appeals are Correct and Do Not Contravene either the Specific Provisions of or the Policies Underlying ERISA.

The District Court found that the terms of the Plan were contained in Trust Company's written Application to Great-West, Great-West's letter acknowledging the Application and the prior insurance-funded Northwestern plan document. The District Court's approach

in incorporating each of these documents into the Plan accurately reflected the intent of the parties responsible for devising and implementing the Plan. In both the District Court and Court of Appeals, Petitioner unsuccessfully contended that, because the "Application for Group Insurance" from Trust Company to Great-West did not contain any provisions describing benefit offsets for income from other sources, the Plan should be interpreted as not containing such provisions, notwithstanding the undisputed intent of the parties and the fact that none of the parties ever believed that the Application contained all of the Plan provisions.

The District Court correctly held that ERISA does not require that all relevant provisions of an employee benefit plan must be contained in a single written document. As stated in the District Court opinion:

> "While it is true that 29 U.S.C. § 1102(a)(1) requires that every employee benefit plan 'shall be established and maintained pursuant to a written instrument,' the Court has found no authority that states that this written instrument must be one all-inclusive document. Indeed, the legislative history indicates that Congress contemplated the possibility of more than one writing constituting an ERISA plan. The conference committee report states: 'A written plan is to be required in order that every employee may, on examining the *plan documents*, determine exactly what his rights and obligations are under the

plan.' 1974 U.S. Code Cong. & Ad. News 4639, 5077-78 (emphasis added)."

Myron v. Trust Company Bank Long Term Disability Benefit Plan, 522 F. Supp. 511, 519 (N.D. Ga. 1981).

The District Court properly used extrinsic evidence in determining *which* documents constituted the Plan, and after having done that, it used those documents to determine the merits of Petitioner's claims. Such an application of parol evidence in no way violates the requirements contained in 29 U.S.C. §1102. In fact, Petitioner has never identified *any* ERISA provision that supports his rather unusual position that a document (the "Application") should be held to contain *all* of the terms of the Plan despite the fact that it was never intended by any of the parties to reflect the Plan provisions.

The District Court properly found that the terms of the Plan were evidenced both by the Application and by provisions contained in the Northwestern plan document. In so doing, the District Court applied well-established rules of contract interpretation (relying on both Georgia and Federal case law) by permitting the use of extrinsic evidence to determine what documents the parties intended to constitute their agreement. As stated by the Fifth Circuit Court of Appeals in *Carolina Metal Products Corp. v. Larson*, 389 F.2d 490 (1968):

"[N]o rule bars 'parol evidence' or any other relevant evidence for the purpose of determining whether the parties have agreed upon the writing as

> a complete and accurate statement of what is agreed upon between them."

389 F.2d at 493. *See also Vanston v. Connecticut General Life Insurance Co.*, 482 F.2d 337, 341 (5th Cir. 1973).

In determining whether the parol evidence rule bars the introduction of evidence concerning the intentions of the parties, the first question is whether the writing fully states the agreement of the parties so as to be an integration of the parties' understanding:

> "To answer this question a court should consider the writing as well as the circumstances surrounding its execution, . . . and parol and extrinsic evidence may be used in making this determination."

Brown v. Financial Service Corporation, International, 489 F.2d 144, 149 (5th Cir. 1974).

The District Court, with the aid of undisputed parol evidence, correctly found that the *written* benefit offset provisions of the Northwestern document were part of the *written* Plan. By so doing, the District Court found the Plan's provisions to be in agreement with the undisputed intent of the contracting parties. There having been no violation of the ERISA requirement that all elements of the Plan be maintained in writing, there is no basis for Petitioner's contention that the District Court's admission of parol evidence to determine which documents constitute the Plan "supersedes" ERISA in violation of 29 U.S.C. § 1144.

Petitioner's contention that allowing the result below to stand would somehow lead to a "significant ero-

sion" of ERISA's protections is similarly groundless. Not only was there an undisputed intent of the contracting parties to incorporate the Northwestern plan document's benefit offset provisions into the Plan, but Petitioner also acknowledges that prior to his retirement from Trust Company "he had no reason to expect disability benefits which were not subject to the offset provisions of the Northwestern plan." Petition at 26. Moreover, the single document (the Application) which Petitioner contends constitutes the *entire* integrated plan document was *never* intended by the parties to contain all of the Plan's provisions, and was incomplete on its face. Certainly, the purposes of ERISA are best served, both as to Petitioner and other plan participants, by enforcing a provision agreed upon by the contracting parties and contained in the writings which at all relevant times were considered by the parties to contain the Plan provisions.

Respondent Great-West submits that the result reached by the courts below was demanded by the applicable rules of contract interpretation and is entirely consistent with both the specific provisions and the purpose of ERISA.

CONCLUSION

Respondent The Great-West Life Assurance Company respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

J. D. FLEMING, JR.

Counsel of Record for Respondent
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TRUST COMPANY BANK LONG TERM DISABILITY BENEFIT PLAN, TRUST COMPANY BANK AND GREAT-WEST LIFE ASSURANCE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER FOR A WRIT OF CERTIORARI

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TRUST COMPANY BANK LONG TERM DISABILITY BENEFIT PLAN, TRUST COMPANY BANK AND GREAT-WEST LIFE ASSURANCE COMPANY,
Respondents,

REPLY BRIEF OF PETITIONER FOR A WRIT OF CERTIORARI

A. INTRODUCTION.

This case classicly poses an extremely important question of federal law: whether parol evidence admitted under a state evidentiary rule may be used to establish offsets to an employee benefit plan and thereby negate the requirement of ERISA[1] that the plan be

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[1] The same abbreviated references as were used in the Petition for Certiorari will be used in this brief.

administered in accordance with a written plan document which specifies the basis on which payments are to be made to and from the plan.[2]

It is the petitioner's position that even state evidentiary rules must yield when they conflict with preemptive federal law. In opposing the petition for certiorari, the respondents chose not to contest this proposition. Rather, they attempted to restate the facts and recast the issue in a more favorable light.

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[2]Because this issue is so clearly posed by the pertinent documents, the petitioner has requested that the Clerk of the Eleventh Circuit Court of Appeals forward certified copies of the following excerpts from the record: (i) the application submitted by Trust Company to Great-West; (ii) the May 1, 1979, letter from Great-West to Trust Company accepting the application; (iii) the Northwestern National plan which expired April 30, 1979; and (iv) the initial draft of the Great-West plan dated "7/12/79" (meaning December 7, 1979).

B. THE FACTS.

In their statement of facts, the respondents glossed over the fact that the District Court established offsets against the petitioner's basic benefits purely by the use of parol evidence. The respondents assert that when the disability plan was changed from Northwestern National to Great-West:

> "[I]t is undisputed that there was a complete meeting of the minds between Trust Company and Great-West with regard to the provisions of the Plan; the agreement was that the existing Northwestern plan document's benefit provisions (including the offsets for Income from Other Sources) would continue to apply." Opposition Brief of Great-West, at 7; See also Opposition Brief of Trust Company, at 4 and 6.

This assertion ignores the salient facts. The Northwestern document was between different parties. It did not continue in effect, but, as the District Court concluded, it "expired by its own terms on April 30, 1979." Despite this, the respondents failed to memorialize

their "undisputed intention" in the Great-West application for insurance, in the letter from Great-West to Trust Company accepting the application or in any other writing. Later, the respondents apparently encountered difficulty in expressing this "undisputed intention" as the "benefit provisions" set forth in the initial draft of the Great-West plan bore no resemblance, either in form or in substance, to the provisions of the Northwestern plan. Finally, the Great-West plan was substantively different from the Northwestern plan in its core provisions relating to eligibility, benefit amounts, and funding. The only document which reflected these changes and contained the four elements required by ERISA for a plan was the Great-West application. Myron v. Trust Company Bank Long-Term Disability Benefit Plan, 522 F.Supp. 511, 516-517 (N.D.Ga. 1981).

The respondents imply in their statement of facts (but do not state) that the Great-West application contains references to the Northwestern offset provisions. They do this by stating:

> "The pages from the Northwestern plan document defining offsets for income from other sources apparently were inadvertently omitted from the attachments to [the application]... The Application does contain references to "income from other sources" but that term is not defined within the Application itself." Opposition Brief of Great-West at 6; See also Opposition Brief of Trust Company, at 6.

The fact is, there is absolutely no evidence, parol or otherwise, that anyone intended to attach to the application copies of the pages containing offset provisions from the Northwestern plan. The words "Income from Other Sources" which appear in the application do not expressly refer to and have not been specifically linked by parol evidence to any offsets or any portion of the Northwestern plan.

The opinion of the District Court on this point is quite clear. The Court noted at one point that, "there is also no mention of any offset provisions in the application..." and at another point that, "there is admittedly no reference to these [offset] provisions...." Myron, supra, 522 F.Supp. at 517-18.

C. THE ISSUE.

The respondents attempted to recast the issue posed by the petition for certiorari as follows:

> "The Petitioner has mis-characterized the holding below by implying that the Eleventh Circuit and the District Court concluded that the Georgia parol evidence rule superseded ERISA so that a plan required to be in writing under ERISA need not actually be in writing. To the contrary, the courts below held only that an employer's ERISA plan need not be contained solely within the confines of a single document, and that undisputed parol evidence could be used to determine which documents constituted the entire plan." Opposition Brief of Great-West, at 8 (original emphasis); See also Opposition Brief of Trust Company, at 8.

The plan "determined" by the District Court through the use of parol evidence consists of the application which was signed by Trust Company and accepted by Great-West and of an excerpt from the expired Northwestern plan relating to offsets. Yet, the application contained no reference to offsets and did not refer to or incorporate that portion of the prior plan.

If parol evidence may be used to construct a plan from bits and pieces of an expired plan between different parties, then no participant's benefits are secure. See Snyder v. Titus, 513 F.Supp. 926 (E.D.Va. 1981) and citations in footnote 4 of Petitioner's Application for Certiorari at 12. The point is simply this: the linkage of the offsets to the Great-West plan was purely parol. The offset provisions of any other plan or policy could have been similarly linked by parol.

The parol linkage of provisions in different writings which are not connected by internal references to one another is as contradictory to the requirement of a writing as the actual establishment of the terms of a provision by parol. For this reason, as noted in the Application for Certiorari, the general Georgia rule is that documents comprising a contract governed by the Statute of Frauds may not be linked by parol evidence, but must be "internally connected [and] intelligible without parol aid." Freeman v. Baker, 147 Ga. App. 168, 169, 248 S.E.2d 298 (1978) and citations in footnote 7 of Petitioner's Application for Certiorari at 16.[3]

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[3]The petitioner always contended below that ERISA precluded the court from looking beyond the application to determine plan provisions. The petitioner also contended that the Georgia parol evidence rule, when properly applied, produced the same result.

Under ERISA, there is no reason that a plan cannot be contained in more than one document so long as the documents are unambiguously adopted by an internal cross-reference.

It is true, as noted by Great-West, "[t]hat private parties, not the Government, control the level of benefits" of employee benefit plans. Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 511 (1981), quoted in Opposition Brief of Trust Company at 10. But, this does not mean that private parties are free to establish the level of benefits through the use of parol evidence after a claim is filed. Under ERISA, the level of benefits must be selected in advance and clearly delineated in a written plan.

The District Court's use of parol evidence to establish offsets to the disability plan, and reduce the petitioner's benefits, undermines both the

express requirements and the spirit of ERISA. Affected plan participants will rarely be in a position to contest parol evidence establishing the level of benefits purportedly "intended" by plan sponsors. The evidence will be controlled by the parties whose interests are furthered by the discriminatory establishment of benefit levels. Courts will be forced to access the credibility of such evidence in a vacuum. The decision opens the door to discrimination and abusive practices and thus has far-reaching implications. As that is the case, the conflicting state law must yield to its preempting federal legislation.

D. CONCLUSION.

For the reasons set forth above and in the petition, the petition for certiorari should be granted.

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